

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of:)
)
Petition of Qwest Corporation for Forbearance)
Pursuant to 47 U.S.C. § 160(c) in the)
Omaha Metropolitan Statistical Area)
)
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WC Docket No. 04-223

**COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX
COMMUNICATIONS AND XO COMMUNICATIONS, LLC IN SUPPORT OF
PETITION FOR MODIFICATION OF MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC.**

Covad Communications Group, NuVox Communications and XO
Communications, LLC (collectively, “Commenters”), by their attorneys, respectfully submit these comments in response to the Federal Communications Commission’s (“Commission”) July 30, 2007 Public Notice soliciting comment on the Petition for Modification of the *Omaha Forbearance Order* filed by McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) in the above-captioned proceeding.¹ The Commenters support McLeodUSA’s request for modification of the *Omaha Forbearance Order*.² The Commenters agree with McLeodUSA that the Commission’s “predictive judgment” that Qwest Corporation (“Qwest”) would provide, at just and reasonable rates, wholesale offerings to replace the forborne Section 251(c)(3)

¹ Public Notice, *Pleading Cycle Established for Comments on McLeodUSA Telecommunications Services, Inc.’s Petition for Modification of the Qwest Omaha Order*, WC Docket No. 04-223, DA 07-3467 (rel. Jul. 30, 2007).

² *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”), *aff’d Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir. Mar. 23, 2007).

network elements has proven incorrect and that the Commission should accordingly reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations.

I. BACKGROUND

On December 2, 2005, the Commission released its Memorandum Opinion and Order granting, in part, Qwest's request for forbearance from certain of its obligations to provide facilities and services to other carriers.³ Specifically, Qwest was granted forbearance from its obligation to provide competitors unbundled loops and dedicated transport pursuant to Section 251(c)(3) of the Telecommunications Act of 1934, as amended (the "Act"). The Commission based its decision in part on the theory that Qwest voluntarily would continue to provide the network elements on a wholesale basis at just and reasonable rates and terms and, in any event, was obligated to provide the services at such rates pursuant to Section 271 of the Act.⁴ As discussed below and in the McLeodUSA Petition, Qwest has not made these facilities available in the manner predicted by the Commission and the *Omaha Forbearance Order* thus should be modified to reinstate requesting carriers' access to Section 251(c) loop and transport elements to ensure that Qwest complies with the Commission's expectations regarding Qwest's provision of these facilities.

II. QWEST'S POST-FORBEARANCE BEHAVIOR JUSTIFIES REINSTATEMENT OF THE SECTION 251(C)(3) UNBUNDLING OBLIGATION

McLeodUSA has provided substantial evidence of the post-forbearance difficulties it has experienced in trying to obtain services from Qwest.⁵ Further, McLeodUSA has identified a significant flaw in the Commission's public interest analysis which calls for reinstatement of the Section 251(c)(3) unbundling obligation on Qwest.

³ *Omaha Forbearance Order*, at ¶ 2.

⁴ *Id.*, at ¶¶ 57-83.

⁵ *McLeodUSA Petition*, at 4-12.

Despite the Commission's predictions to the contrary, McLeodUSA's experiences with Qwest show that Qwest has not been willing to provide McLeodUSA (and likely other competitive carriers) with wholesale access to the network elements for which Qwest received forbearance at just and reasonable prices and terms. McLeodUSA has detailed instances where Qwest has offered network elements but only at rates drastically higher than previous pre-forbearance rates. For example McLeodUSA states that Qwest offered DS0 loops at rates "nearly 30% higher than the previous unbundled network element prices for identical network facilities."⁶ Qwest has made DS1 and DS3 loops available at discounted special access rates but only if McLeodUSA is willing to comply with volume and term commitments and forgo the ability to purchase the facilities as unbundled network elements ("UNEs"), at lower rates, throughout the rest of Qwest's service territory.⁷

McLeodUSA notes that Qwest refuses to negotiate wholesale pricing for its high capacity facilities and does not deviate from its tariffed special access rates.⁸ Qwest's refusal to negotiate the rates, terms and conditions of its wholesale services requires competitors to purchase facilities at whatever rates - including unjust and unreasonable rates - Qwest chooses to impose or not purchase the necessary facilities at all. Further, McLeodUSA has had no success in obtaining such high capacity facilities pursuant to Qwest's Section 271 obligation to provide such facilities.⁹ Despite the fact that Qwest was denied forbearance from its Section 271 obligation to provide unbundled access to loops and transport facilities,¹⁰ McLeodUSA has been

⁶ *McLeodUSA Petition*, at 4.

⁷ *Id.*, at 5.

⁸ *Id.*, at 5.

⁹ *Id.*, at 8.

¹⁰ *Omaha Forbearance Order*, at ¶ 96.

unable to obtain a list detailing prices for the relevant facilities.¹¹

The Commenters agree with McLeodUSA that the Commission’s public interest evaluation during its forbearance analysis focused on the wrong standard and did not justify the grant of forbearance from Section 251(c)(3). McLeodUSA notes that when considering whether the forbearance grant would satisfy the public interest, as required by Section 10(c), the Commission focused on how the grant would promote “regulatory parity” between Qwest and Cox.¹² In fact, the Section 10(c) public interest standard requires the Commission to consider whether forbearance “will *promote competitive market conditions*” and “*enhance competition* among providers of telecommunications services.”¹³ The statute provides that “[i]f the Commission determines that such Communications Act of 1934 forbearance will promote competition among providers of telecommunications services, the determination may be the basis for a Commission finding that forbearance is in the public interest.”¹⁴ While the Commission appeared to base its forbearance determination in part on the fact that regulatory parity that would result from the forbearance grant,¹⁵ there is no mention in the statute of “regulatory parity” as a basis for determining that the public interest justifies a grant of forbearance.

III. THE SECTION 251(C)(3) FORBEARANCE GRANTED TO QWEST SHOULD BE REINSTATED BECAUSE MARKET CONDITIONS DEMONSTRATE THAT THE SECTION 10 FORBEARANCE STANDARD HAS NOT BEEN MET

In the *Omaha Forbearance Order*, the Commission identified a comprehensive analytical process for evaluating Qwest’s Section 251(c)(3) forbearance request but then did not

¹¹ *McLeodUSA Petition*, at 7.

¹² *Id.*, at 12-13.

¹³ 47 U.S.C. §160(c) (emphasis added).

¹⁴ 47 U.S.C. §10(c) (emphasis added).

¹⁵ *Omaha Forbearance Order*, at ¶¶ 76, 78.

fully apply that framework to Qwest’s Petition. In particular, the Commission relied on data applicable to one product market - the retail or mass market - as evidence of competition in another market – the enterprise market. The Commission then applied and relied upon its predictive judgment that Qwest would continue to provide competitors with the necessary facilities even if granted forbearance – a prediction that, as market conditions demonstrate, has proven false. In light of these proven deficiencies in the Commission’s forbearance analysis, the Commission should modify the forbearance granted to Qwest.

A. The Commission Did Not Fully Apply its Identified Market Analysis to the Enterprise Market

In determining whether to grant Qwest forbearance from its Section 251(c)(3) obligation to provide competitors with unbundled loops and transport in certain parts of the Omaha Metropolitan Statistical Area (“MSA”), the Commission identified the factors it would consider and the product markets to which the analysis would apply but then failed to apply the analysis separately to each of those markets.

When conducting its forbearance analysis, the Commission stated that forbearance would be warranted “only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a).”¹⁶ The Commission then determined that there were two relevant product markets – the mass market, consisting of retail and small business customers, and the enterprise market, consisting of medium-sized and large-sized businesses.¹⁷ The Commission created the two distinct product markets because it acknowledged that “the services offered to mass market customers may not be adequate or feasible substitutes for services offered to

¹⁶ *Omaha Forbearance Order*, at ¶61.

¹⁷ *Id.*, at ¶22.

business customers.”¹⁸ The Commission then purported to apply the requirements of Section 10 separately to each product market.

The Commission did not consider, however, whether “sufficient facilities-based competition” existed in the enterprise market, instead, extrapolating that such competition existed based on information presented regarding the mass market.¹⁹ Specifically, the Commission noted that:²⁰

in light of record evidence of [Cox Communications, Inc.’s] strong success in the mass market, its possession of the necessary facilities to provide enterprise services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Omaha MSA, and its current marketing efforts and emerging success in the enterprise market, we must conclude that Cox poses a substantial competitive threat to Qwest for higher revenue enterprise services as well.

The Commission also cited general evidence that some competitors were able to provide service to enterprise customers by utilizing special access services obtained from Qwest and that actual and potential competition from Cox and from competitors relying on Qwest’s wholesale inputs justified a grant of forbearance from the Section 251(c)(3) obligations.²¹ The Commission essentially glossed over the lack of empirical evidence of “sufficient *facilities-based* competition” in the enterprise product market and, instead, relied on imprecise indicators and, as described below, its “mistaken” predictive judgment to find that forbearance was warranted with respect to the enterprise market.

¹⁸ *Id.*, at ¶22.

¹⁹ *Id.*, at ¶66.

²⁰ *Id.*, at ¶66.

²¹ *Id.*, at ¶68.

B. The Commission's Reliance on its "Predictive Judgment" to Support its Market Analysis Regarding Qwest's Provision of Services Has Proven Incorrect

The Commission sought to buttress the rationale for granting relief in the enterprise market by relying – with demonstrably bad results - upon its “predictive judgment” regarding how Qwest would act if granted the forbearance it requested. The Commission mistakenly predicted that, once granted forbearance with respect to its Section 251(c)(3) obligations to provide loop and transport elements, Qwest would continue to provide those necessary facilities and services to its competitors. In particular, the Commission predicted that “Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0-, DS1-, or DS3-capacity facilities,” in part because withdrawal of the service offerings would be impermissible under Section 271.²² The Commission further anticipated that:²³

[f]aced with aggressive “off-net” competition from Cox, we predict that Qwest will endeavor to maximize use of its existing local exchange network, providing service at retail *and at wholesale*, in order to minimize revenue losses resulting from customer defections to Cox’s service. In short, Qwest will prefer that a customer be served by a wireline competitor using Qwest’s facilities at wholesale rates above that customer’s use of Cox’s network, which offers Qwest no revenue whatsoever but only a miniscule reduction in its costs.

Unfortunately for McLeodUSA and other competitive carriers operating in the Omaha MSA, the Commission’s predictions have proven incorrect. As discussed above, McLeodUSA has demonstrated that Qwest is not willing to negotiate wholesale rates for the subject high capacity facilities, instead requiring competitive carriers to accept tariffed rates, and

²² *Id.*, at ¶79-80.

²³ *Id.*, at ¶81 (emphasis in original).

Qwest refuses to provide pricing for those facilities pursuant to its Section 271 obligations.²⁴

The failure of the Commission's predictive judgment is also highlighted by the condition in its order granting ACS of Anchorage, Inc. ("ACS") forbearance from some of its Section 251(c)(3) and Section 252(d)(1) service obligations.²⁵ In the *Anchorage Forbearance Order*, the Commission recognized that ACS was not subject to Section 271 obligations and consequently imposed a condition on the forbearance grant requiring ACS to provide access to loops pursuant to commercially negotiated agreements and pointed to a specific preexisting commercial agreement to be utilized until new agreements could be negotiated.²⁶ In imposing the condition, the Commission stated that:²⁷

Our decision to impose a continuing access obligation on ACS to all requesting carriers as a condition of forbearance finds support in the Commission's decision in the Qwest Omaha Order. . . . The ongoing unbundling obligation we conditionally impose on ACS to provide access to loop facilities mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval to provide access to these facilities.

Because the condition in the *Anchorage Forbearance Order* is designed to mirror the Section 271 obligations to which Qwest is still subject, the outcome of the ACS and Qwest forbearance grants should have been the same – the continued provision to competitors of access to loops and transport facilities at just and reasonable rates. McLeodUSA's Petition makes clear, however, that Qwest has not voluntarily provided access to loops and transport at just and reasonable rates and terms, thus leading to the conclusion that the regulatory mandate to provide

²⁴ *McLeodUSA Petition*, at 4-6, 10-12.

²⁵ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*").

²⁶ *Anchorage Forbearance Order*, at ¶¶ 39, 42.

²⁷ *Id.*, at ¶42 (emphasis added).

such facilities pursuant to Section 251(c)(3) is required to ensure that competition, and consumers, are not disrupted.

In the *Omaha Forbearance Order*, the Commission acknowledged that its predictive judgment could be proven to be wrong and could warrant a modification of the forbearance grant. Specifically, the Commission stated that “[t]o the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling.”²⁸ The Commission also promised to “monitor the accuracy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action.”²⁹ Since, in this case, the Commission’s predictive judgment has, indeed, been proven incorrect, modification of the *Omaha Forbearance Order* is the appropriate action to be taken.

²⁸ *Omaha Forbearance Order*, at n.204.

²⁹ *Id.*, at ¶83.

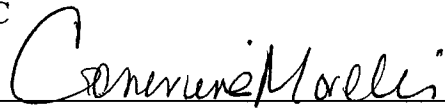
IV. CONCLUSION

For the foregoing reasons, the Commission should grant the McLeodUSA Petition for Modification and reinstate Qwest's Section 251(c)(3) unbundling obligation in the Omaha MSA.

Respectfully submitted,

**COVAD COMMUNICATIONS GROUP, NuVOX
COMMUNICATIONS AND XO COMMUNICATIONS,
LLC**

By:



Brad E. Mutschelknaus
Genevieve Morelli
Denise N. Smith

KELLEY DRYE & WARREN LLP
WASHINGTON HARBOUR
3050 K STREET, NW, SUITE 400
WASHINGTON, DC 20007
202-342-8400 (PHONE)
202-342-8451 (FACSIMILE)
Their Attorneys

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